No. 84831-9

SUPREME COURT
OF THE STATE OF WASHINGTON

J.Z. KNIGHT,

Respondent/Petitioner,

v.

CITY OF YELM and TTPH 3-8, LLC,

Appellants/Respondents.

ANSWER OF TTPH 3-8, LLC ("TAHOMA TERRA"), TO PETITION FOR REVIEW

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I. Identity of Respondent and Court of Appeals Decision

Respondent TTPH 3-8, LLC ("Tahoma Terra"), opposes the petition for review. The petition for review should be denied because the Unpublished Opinion of April 13, 2010 ("the Decision") does not involve issues of substantial public interest or conflict with Washington caselaw.

II. Counter-Statement of Issues

A. Standing

The Court of Appeals properly ruled that Knight lacked standing to challenge the City's decisions because she failed to demonstrate that she will be "specifically and perceptibly harmed" by the preliminary subdivision approvals, and because she failed to show that a judgment in her favor would substantially eliminate or redress the alleged prejudice.

B. Attorney fees

The Court of Appeals properly awarded attorney fees to Tahoma Terra under RCW 4.84.370(1) because the trial court ultimately upheld the City's decisions to grant the conditional preliminary subdivision approvals and Tacoma Terra was the substantially prevailing party.

C. Tahoma Terra should receive its attorney fees and costs for answering the petition for review.

Under RAP 18.1(j), a party who was awarded attorney fees and costs upon prevailing before the Court of Appeals may be awarded attorney fees and costs for prevailing in opposition to a petition for review. Tahoma Terra was awarded attorney fees and costs by the Court of Appeals. Should this Court deny the petition for review, Tahoma Terra

requests an award of attorney fees and costs, to be detailed in a subsequent affidavit within 10 days following the filing of a decision making such an award pursuant to RAP 18.1(d).

III. Counter-Statement of the Case

A. Tahoma Terra obtained conditional approval of its preliminary plat before the Examiner.

This is a land use case in which five applicants applied for preliminary plat subdivision approvals with the City of Yelm. Among them was Tahoma Terra, which submitted its preliminary plat application for the Tahoma Terra Subdivision to the City. AR: 4/27/07 Application for Preliminary Plat. The Examiner held a public hearing. AR: Notice of Public Hearing, Yelm Hearing Examiner. At the hearing, Knight testified and asserted, in relevant part, that Tahoma Terra and the City failed to establish that appropriate provisions have been made for potable water supplies to serve the subdivision, that the subdivision complies with the water availability requirements of the Comprehensive Plan and the Water System Plan, and that the proposed water supply is adequate and available to serve the subdivision concurrently with development. CP 78–79. The City's Director of Community Development, testified that the City, as the water purveyor, had determined it could serve the subdivision, but that the City does not issue a letter of water availability to itself. AR: Transcript of 7/23/07 Hearing on the Tahoma Terra Subdivision at 14: 2–25, 70:14–19, and 71:10–14. The Examiner left the record open for Tahoma Terra and the City to respond further to Knight's newly asserted position, and Knight

to reply. *Id.* at 80:10–83:17. In post-hearing submissions, Tahoma Terra and the City provided evidence of the City's water rights and water demand, as well as evidence of the water right conveyances and transfers. AR: 8/2/07 and 8/17/07 Letters from Curt Smelser to the Yelm Hearing Examiner; CP 975–981; and CP 984–995. The Examiner then closed the record and denied Knight's request to re-open. CP 1036.

The Examiner considered the parties' submissions and arguments, the City's Plans, the YMC, the Growth Management Act ("GMA") and the Subdivision Act; weighed the evidence; and conditionally approved the Tahoma Terra Subdivision (Examiner's Decision). CP 321–338. The Examiner specifically determined, *inter alia*, that (1) concurrence of potable water and fire flow must occur at the final plat approval stage and/or upon submittal of an application for a building permit; (2) RCW 58.17.110 requires a finding that a preliminary plat for a subdivision makes "appropriate provision" for potable water supplies, while RCW 19.27.097(1) requires evidence of the actual provision of potable water supplies at the building permit stage; (3) at the preliminary plat approval stage, an applicant must show a reasonable expectancy that the water purveyor will have adequate water to serve the development upon final plat approval; (4) the documents submitted provide a "reasonable expectation" that domestic water will be available to serve the subdivision upon submittal of applications for building permits or for final plat approval; (5) while much of the written evidence in the record addressed the present and future amount of available water to the City, the most

persuasive evidence was the letter from Skillings Connelly, the City's engineer, which showed that upon transfer of the Golf Course and McMonigle water rights and by securing a new water right in 2012, the City's water rights will exceed cumulative water demand. CP 321–338.

Knight moved for reconsideration of the Examiner's Decision, requesting an additional requirement that provisions for water be made prior to final subdivision approval. CP 97–103. The Examiner denied Knight's motion, but added two additional findings:

> The City has provided competent evidence regarding the availability of water, the City's water plan, and the planning process. Evidence in the record establishes that water rights from the Dragt farm have been conveyed to the City and approved by the State Department of Ecology (DOE). Evidence also shows the conveyance of water rights from the Nisqually Golf and County Club to the City. Evidence also shows that the City has secured a lease of the McMonigle farm water rights. Evidence also shows that the City has a plan in place to submit an application for transfer of these additional water rights. Furthermore, the City has shown that it is actively pursuing the acquisition of additional water rights and that it has a reasonable expectancy of acquiring such rights. If Ecology does not approve future applications, the City may need to explore other options to provide potable water and fire flow to the City as a whole.
>
> While State law and the Yelm Municipal Code require potable water supplies at final plat approval and building permit approval, the Examiner has added a condition of approval requiring such. However, the balance of the conditions of approval requested by Mr. Moxon [Knight's attorney] in his response are beyond the Examiner's authority and interfere with the City's ability to manage his [sic] public water system. Furthermore, the proposed conditions require actions by the City beyond the control of

> the applicant and are therefore not proper as the applicant cannot require the City to take such actions. These conditions would prohibit the applicant from getting final approval of its project even if it had satisfied all requirements for final plat approval.

CP 392–396 (emphasis added). The Examiner also added the following condition:

> The applicant must provide a potable water supply adequate to serve the development at final plat approval and/or prior to the issuance of any building permit except as model homes as set forth in Section 16.04.150 YMC.

CP 394. Tahoma Terra had obtained conditional preliminary plat approval.

B. Knight failed to demonstrate standing and meet her burden on appeal.

Knight appealed the Examiner's Decision to the Yelm City Council, which consolidated the appeal with four other appeals of similar developments filed by Knight. Pursuant to YMC 2.26.150.F, Knight's appeal to the City Council was a closed record appeal. Knight presented no facts to the Examiner, either at the open record hearing or in the post-hearing briefing, to demonstrate that she was aggrieved. *See* YMC 2.26.150. Knight conceded this fact in briefing to the superior court. CP 248. Knight also conceded that her appeal to the City Council did not allege she would be aggrieved by the Examiner's Decision or allege facts that, if proven, would support standing. CP 241; CP 249.

Because Knight had not alleged to the Examiner or the Yelm City Council, much less presented evidence that she was "aggrieved," the applicants asked the City Council to deny her appeal based on lack of

standing. Knight first alleged "facts" intended to support her standing to challenge the Examiner's Decision in a consolidated reply brief to the City Council. She did not submit any declarations or affidavits verifying facts allegedly giving her standing. In that reply brief, Knight alleged for the first time that (1) her ability to obtain future water service for an unidentified and undeveloped piece of property she owns in the City of Yelm would be adversely affected by the Examiner's Decision and (2) the Examiner's Decision would impair her "senior" water rights appurtenant to the property she owned in Yelm's Urban Growth Area near the proposed subdivisions. CP 111–116.

After reviewing the briefing and holding a closed record public hearing, the Yelm City Council denied Knight's appeal and issued City of Yelm Resolution No. 481. CP 118–121. The denial of her appeal was based on her lack of standing:

> JZ Knight has not shown that she will actually suffer any specific and concrete injury in fact, within the zone of interests protected by the legal grounds for her appeals, relating to the sole issue raised by her appeals, whether the appropriate provision for potable water has been made for the proposed developments. Therefore, Knight is not an aggrieved person with standing to appeal the Examiner's decisions to the City Council. Notwithstanding the City Council's conclusion that Knight lacks standing to appeal, the City Council contingently decides Knights appeals so that remand and rehearing will not be necessary if, in the future, there is a final judicial determination that Knight had standing to bring these appeals.

CP 119 (emphasis added). After conclusively determining that Knight was

not an "aggrieved" person with standing to appeal the Examiner's decisions, the City Council went on to contingently affirm the Examiner's conditional approval of all five proposed subdivisions. The City Council adopted the Examiner's findings and conclusions. CP 119. Tahoma Terra maintained its conditional preliminary plat approval.

C. Knight won no substantive relief before the superior court, which remanded to clarify the undisputed meaning of the condition and entered prohibited findings and conclusions.

Knight filed a LUPA petition in superior court, challenging the City's conditional preliminary approval of the Tahoma Terra Subdivision and the four other proposed subdivisions. CP 9–28. Knight assigned errors, but she did not assign error to the City Council's determination that she lacked standing or was not an aggrieved person. CP 13–16. Knight sought to reverse the approval of the five proposed subdivisions. CP 24.

In April 2008, two applicants/respondents filed a Motion to Dismiss Knight's petition based on her lack on standing. CP 41–56. The City and Tahoma Terra joined the motion and further argued that Knight's LUPA petition should be dismissed because she failed to appeal the City Council's dispositive determination that she was not an "aggrieved" party under the YMC with standing to administratively appeal the decisions of the Examiner. CP 215–236. The motion was denied. CP 443–446.

Tahoma Terra and others moved for motion for summary judgment, and this was denied, so the parties submitted briefing on the merits. CP 540–557, 659–660, 829–859, 1198–1238, 661–698. Knight

argued that: (1) a finding that appropriate provisions have been made for potable water at the preliminary plat approval stage requires the City to condition preliminary approval on a determination of water availability at the final plat approval stage rather than the building permit stage, and (2) a determination of water availability at the final plat approval stage must be based upon available and Ecology-approved water rights currently held by the water purveyor, which in this case is the City of Yelm, sufficient to serve all demand, including all approved but not yet constructed developments and the pending applications. CP 661–662, 673.

The parties agreed that Knight's urged interpretation was what the Hearing Examiner in fact decided and what the law requires. CP 1641. As to Knight's second argument, Tahoma Terra argued that Knight's position had no basis in law. CP 846–847. Tahoma Terra also argued that the record demonstrated that it had already made appropriate and adequate provisions of potable water for its proposed subdivision and met its burden. CP 855–857.

The superior court held a hearing on Knight's LUPA petition on October 1, 2008, and it issued a letter opinion six days later. CP 1561–1565. Over Tahoma Terra's objections, as well as those of the City and other respondents, the superior court signed Knight's proposed judgment and proposed findings and conclusions. CP 1573–1579, 1581–1591, 1633–1645, 1599–1600, 1603–1605. The superior court "reversed" on the undisputed issue of whether a determination of water availability had to be made both at the final plat approval and building permit stages. CP 1644.

The superior court remanded to re-word the condition, but the meaning remained the same. The superior court also created new obligations of notice to Knight. CP 1644–1645. In an order entered simultaneously, the superior court entered prohibited findings and conclusions. CP 1636–1642. Conclusion of Law #5 provided an inaccurate statement of law and an advisory opinion as to what standards should apply upon future application for final plat approval. CP 1641. Tahoma Terra maintained its conditional preliminary plat approval.

D. Tahoma Terra substantially prevailed at the Court of Appeals.

Tahoma Terra timely appealed, as did the City. *See* CP 1663–1665. Knight participated in the appeal as a respondent and challenged Tahoma Terra with a 58-page opposition brief. Knight vigorously opposed Tahoma Terra on appeal. Tahoma Terra requested an award of attorney fees and costs on appeal, under RCW 4.84.370(1). The Court of Appeals held that Knight lacked standing the challenge the preliminary subdivision approvals, affirmed the challenged preliminary subdivision approvals, reversed the trial court, dismissed Knight's LUPA petition for lack of standing, and awarded attorney fees to Tahoma Terra and the City.

The Court of Appeals noted that "[a]lthough the trial court remanded for modification of the examiner's condition, it ultimately upheld the City's decisions to grant the preliminary subdivision approvals." Decision at 14. At every single level of the proceedings, Tahoma Terra obtained and maintained the City's decision to grant the

preliminary subdivision approvals. Tahoma Terra substantially prevailed throughout because the measure of prevailing was the substance of relief, namely, that Tahoma Terra achieved the continued approval of its preliminary plat application with a condition that Tahoma Terra agreed was embodied in the original decision by the City. In contrast, Knight achieved no relief against Tahoma Terra.

IV. Argument and Authority

Review is not warranted, as discussed below. The considerations under RAP 13.4(b) are not met. Knight did not establish standing, and Tahoma Terra substantially prevailed at each level. The decision neither conflicts with Washington law nor involves a substantial public interest.

A. The Court of Appeals correctly ruled that Knight lacked standing.

Knight lacked standing to appeal the Examiner's Decision to the Yelm City Council, and she lacked standing under LUPA. Under the YMC, an appeal of a hearing examiner's final decision to the Yelm City Council can only be filed by an "aggrieved person or agency of record." YMC 2.26.150. Knight failed to comply with the YMC because she did not offer evidence to the Examiner of her alleged standing. Knight needed to establish an evidentiary record of standing before the Examiner. She conceded that she did not do so. CP 248.

Knight's interest amounted only to that of the general public. A LUPA petition must allege facts demonstrating that the petitioner has standing to seek judicial review under RCW 36.70C.060. RCW

36.70C.070(6). Similar to the "aggrieved" standard in the YMC, under LUPA, Knight needed to demonstrate that she is a "person aggrieved or adversely affected by the land use decision" by showing all of the following: (a) the Tahoma Terra Subdivision preliminary plat approval has or likely will prejudice her; (b) the interests she asserts are among those that the City was required to consider when it preliminarily approved the Tahoma Terra Subdivision; (c) a judgment in her favor would substantially eliminate or redress the alleged prejudice; and (d) she has exhausted her administrative remedies to the extent required by law.[1]

Knight's petition alleged insufficient facts to confer standing. Knight's LUPA petition contained allegations virtually identical to those made in her reply brief to the City Council. CP 11–13; CP 111–116. The only other evidence of Knight's standing was presented to the superior court in declarations in response to the motion for summary judgment, and they did not demonstrate that the Examiner's preliminary conditional approval of the Tahoma Terra Subdivision has prejudiced or likely will prejudice her. CP 585–642.

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[1] *See* RCW 36.70C.060(2)(a)–(d). LUPA's standing requirement embodies the Washington Supreme Court's approach in environmental cases. *Save a Valuable Env't (SAVE) v. Bothell*, 89 Wn.2d 862, 865–68, 576 P.2d 401 (1978). Washington courts require an appellant in an environmental case to demonstrate that: (1) the governmental action caused a specific and perceptible injury-in-fact that is immediate, concrete and specific, and (2) that the interest sought to be protected falls within the zone of interests a statute is designed to protect. *Leavitt v. Jefferson County*, 74 Wn. App. 668, 679, 875 P.2d 681 (1994); *Trepanier v. Everett*, 64 Wn. App. 380, 383, 824 P.2d 524 (1992).

The Court of Appeals correctly determined that Knight had no injury-in-fact. She did not demonstrate that the Examiner's preliminary conditional approval of the Tahoma Terra Subdivision has or likely will prejudice her, nor did she set forth facts showing that she will suffer an "injury-in-fact" as a result of the Examiner's decision. Conjectural or hypothetical injuries do not support standing. *Trepanier v. Everett*, 64 Wn. App. 380, 383, 824 P.2d 524 (1992). Knight needed to demonstrate that she will be "specifically and perceptibly" harmed by the appealed action. *Id.* at 382. "An interest sufficient to support standing to sue ... must be more than simply an abstract interest of the general public in having others comply with the law." *Chelan County v. Nykreim*, 146 Wn.2d 904, 935, 52 P.3d 1 (2002) (citations omitted). A bald assertion that a plaintiff has standing is insufficient. *Concerned Olympia Residents for the Env't v. Olympia*, 33 Wn. App. 677, 683, 657 P.2d 790 (1983) ("CORE").[2] The Court of Appeals correctly noted that if Tahoma Terra could not demonstrate its ability to provide an adequate supply of potable water, the City cannot and will not grant final plat approval or issue building permits, and Knight will suffer no injury. *See* Decision at 12–13. If there is adequate water supply, then Knight will suffer no injury. *Id.*

[2] "The pleadings and proof are insufficient if they merely reveal imagined circumstances in which the plaintiff could be affected." *Snohomish County Prop. Rights Alliance v. Snohomish County*, 76 Wn. App. 44, 53, 882 P.2d 807 (1994); *Coughlin v. Seattle School Dist.*, 27 Wn. App. 888, 893, 621 P.2d 183 (1980).

Knight could not show injury-in-fact because the Examiner's Decision was a preliminary conditional approval. The alleged injury-in-fact to Knight's asserted interests are exactly the type of conjectural and hypothetical injuries that are insufficient to support standing. For the Tahoma Terra Subdivision to generate water demand, it must first obtain final plat approval and building permits. The Examiner explicitly conditioned the preliminary approval upon Tahoma Terra providing adequate potable water to serve the subdivision at the time of final plat approval and/or building permits. All parties agreed that this condition means both final plat approval *and* building permit approval. Even if this were not a condition of approval, RCW 58.17.150(1) requires a showing of the adequacy of the proposed potable water supply at final plat approval. Both the Examiner's condition and State law require a showing of an adequate supply of potable water at the time of final plat approval. If such a showing is not made, the City cannot grant final plat approval and Knight's injury will never occur.[3] As a matter of law, no harm can result to Knight's water rights as a result of the preliminary conditional approval of the Tahoma Terra Subdivision. This cannot and will not "necessarily lead to the impacts alleged" by Knight. *See Suquamish Indian Tribe v. Kitsap County*, 92 Wn. App. 816, 830, 965 P.2d 636 (1998).[4]

[3] Homes cannot be built in the Tahoma Terra Subdivision until building permits are issued. If evidence of a potable water supply adequate to serve the Tahoma Terra Subdivision, as required by RCW 19.27.097, is not provided at that time, the City cannot issue building permits. Without building permits, there is no new demand for potable water.

[4] Transfers or changes in water rights cannot be approved unless Ecology

Knight also failed to demonstrate that a judgment in her favor would redress the injuries she claims. RCW 36.70C.060(2)(c). Her claimed injury to her more senior water rights could not have been redressed in her LUPA appeal. In ruling on applications for preliminary subdivision approval, the City has no authority to determine the status or content of the City's water rights; nor does the superior court or the Court of Appeals in an action brought under LUPA. A final determination of water rights may be made only in a formal water rights adjudication under Washington's Water Code. *Rettkowski v. State*, 122 Wn.2d 219, 858 P.2d 232 (1993). That is not the nature of this LUPA action. A judgment in Knight's favor, therefore, would not substantially eliminate or redress her alleged injury as required for standing under RCW 36.70C.060(2)(c).

B. The Court of Appeals correctly awarded attorney fees and costs to Tahoma Terra because it substantially prevailed.

The trial court ultimately upheld the City's decisions to grant the preliminary subdivision approvals. Tahoma Terra substantially prevailed, because it obtained and maintained its conditional preliminary plat approval at each level. The Court of Appeals properly awarded Tahoma Terra its attorney fees and costs under RCW 4.84.370(1). "The determination as to who substantially prevails turns on the substance of the relief which is accorded the parties." *Marine Enters., Inc. v. Sec. Pac.*

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finds that the transfers or changes will not detrimentally impact existing water rights. *See* RCW 90.03.380(1). Knight's allegations of injury-in-fact are entirely conjectural and speculative. *See Coughlin v. Seattle School District*, 27 Wn. App. 888, 891, 621 P.2d 183 (1980).

Trading Corp., 50 Wn. App. 768, 772, 750 P.2d 1290 (1988).

Knight opposed issuance of preliminary plat approval to Tahoma Terra before the Yelm Hearing Examiner. *See, e.g.*, AR: 8/10/07 Letter from Keith Moxon to the Yelm Hearing Examiner. The Examiner granted preliminary plat approval. CP 392–396. The Yelm City Council affirmed that approval. CP 118–121. Knight achieved no substantive relief before the superior court. Knight's LUPA petition raised multiple challenges to the preliminary plat approval. CP 13–16. At the conclusion of the superior court proceedings, the only relief entered was a re-wording of the condition imposed by the Hearing Examiner to affirm a meaning with which all parties agreed. The meaning of the condition was not disputed. The trial court's reversal was in name only; Knight obtained no relief that differed from the City's decision, and Tahoma Terra maintained its conditional preliminary plat approval. Knight obtained improper findings and conclusions regarding a future final plat application that was not before the superior court,[5] so Tahoma Terra appealed and continued to prevail before the Court of Appeals. Tahoma Terra was properly awarded its attorney fees and costs under RCW 4.84.370(1). Knight argues that RCW 4.84.370 only permits attorney fees to be awarded against an

[5] Knight admitted on appeal that the findings were advisory and had no meaning. *See* Amended Respondent's Brief at 43 n. 15 (noting that the use of the word, "if," in Conclusion #5 renders conclusion advisory, and the conclusion just was included "in order to assist the parties"). Knight also stated that Tahoma Terra had to appeal or the findings and conclusion were binding. *Id.* at 55 ("absent an appeal" a superior court's findings and conclusions cannot be ignored).

appellant, rather than a respondent. The statute contains no such limitation. The statute does not insulate a party like Knight from liability for attorney fees where she seeks improper relief in the superior court, triggers an appeal by the applicant or local authority, and opposes appeal.

Knight's arguments are not advanced by cited caselaw. *See Gig Harbor Marina, Inc. v. Gig Harbor*, 94 Wn. App. 789, 973 P.2d 1081 (1999); *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 120 P.3d 56 (2005). In those cases, the challenges were brought by parties who did appeal and against whom fees were awarded. The court referred to "an appellant" in that context. The language in these cases regarding imposing fees on an appellant is not determinative of this issue, which was not before those courts.[6] An applicant who appeals from the City's decision can still be the prevailing party at the City level if the City's decision was more favorable to the applicant than the hearing examiner's decision had been. *See Gig Harbor Marina*, 94 Wn. App. at 797–99; *see also Habitat Watch*, 155 Wn.2d at 415–16. The *Gig Harbor Marina* court noted that the statute was "neutral on its face" as to who could qualify for fees. *Gig Harbor Marina*, 94 Wn. App. at 797.

The prior split among divisions was resolved by *Habitat Watch* and *Nickum v. City of Bainbridge Island*, 153 Wn. App. 366, 223 P.3d 1172 (2009). Previously, Division I and II differed whether the court had

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[6] *See State v. Potter*, 68 Wn. App. 134, 150 n.7, 842 P.2d 481 (1992) (providing that statements unrelated to an issue before the court (*obiter dictum*) need not be followed).

to reach the merits of the local decision for a party to qualify as a prevailing party under RCW 4.84.370(1)–(2).[7]

The Supreme Court's decision in the subsequent case *Habitat Watch v. Skagit County,* construed RCW 4.84.370 to permit an award of fees to an applicant or a local authority when that party prevails on procedural grounds. In *Habitat Watch,* the Washington Supreme Court awarded attorney fees under RCW 4.84.370 to parties that prevailed on procedural grounds, including a motion to dismiss challenges to two land use decisions for failure to exhaust administrative remedies under LUPA. *See Habitat Watch,* 155 Wn.2d at 404–13. The Court reviewed the statute, noted that the local authority and the applicant had prevailed at all stages, and concluded that fees were due unless the statute was unconstitutional. *Id.* at 412–16.[8]

After *Habitat Watch,* the issue again was presented to the Court of Appeals in *Nickum.* Both the hearing examiner and the superior court had dismissed for untimeliness the Nickums' appeal of a decision to construct a wireless communication facility on a Puget Sound Energy pole on Bainbridge Island. *Id.* at 371. The Court of Appeals affirmed the dismissal

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[7] *See Overhulse Ass'n v. Thurston County,* 94 Wn. App. 593, 972 P.2d 470 (1999) (must reach merits), and *Witt v. Port of Olympia,* 126 Wn. App. 752, 758-60, 109 P.3d 489 (2005) (same); *cf. Prekeges v. King County,* 98 Wn. App. 275, 285, 990 P.2d 405 (1990) (can prevail on any ground).

[8] The *Overhulse, Witt,* and *Quality Rock* opinions predate *Habitat Watch v. Skagit County. Habitat Watch* was decided September 2005. *Witt* was decided April 2005. *Quality Rock Products Inc. v. Thurston County,* 126 Wn. App. 250, 275, 108 P.3d 804 (2005), was decided March 2005. *Overhulse* is a 1999 case. The split was resolved.

for failure to exhaust administrative remedies as required for LUPA standing, and awarded attorney fees to the applicant and the city under RCW 4.84.370, stating, "If a party receives a building permit and the decision is affirmed by two courts, they are entitled to fees under this statute." *Id.* at 383 (citing *Habitat Watch*, 155 Wn.2d at 413). Here, Tahoma Terra received approval of its preliminary plat application, and that approval was continued by the superior and appellate courts, like the building permit in *Nickum*. Tahoma Terra was entitled to its fees.

The *Nickum* court held that the parties who succeeded with their procedural defenses were prevailing parties, stating that "'Prevailing party' under the statute includes circumstances in which courts dismiss a LUPA action on jurisdictional grounds." *Id.* (citing *San Juan Fidalgo Holding Co. v. Skagit County*, 87 Wn. App. 703, 709, 713–15, 943 P.2d 341 (1997)). The split between divisions and the resolution of the issue in *Habitat Watch* was specifically briefed to the *Nickum* court. *See Nickum v. City*, 2008 WA App. Ct. Briefs 967745, 2009 WA App. Ct. Briefs LEXIS 65 (Wash. Ct. App. Jan. 23, 2009). Aware of the prior caselaw and the more recent development in the law, the *Nickum* court followed *Habitat Watch* and awarded fees.

Knight's arguments regarding notice requirements are misplaced. The notice requirements are irrelevant to whether Tahoma Terra prevailed, as they were not imposed on Tahoma Terra. Moreover, Knight conceded to this Court that the superior court's conclusions "regarding the showing of water availability required for final plat approval" were meaningless

and were entered simply "in order to assist the parties." Amended Respondent's Brief at 43 n.15. A meaningless and advisory opinion does not demonstrate actual relief or success. Knight's argument regarding the timing of this concession is supported by no caselaw, and it is not well taken. As to standing, a prevailing party analysis does not require issue-by-issue examination of offered defenses. Although the superior court did not dismiss Knight's petition for lack of standing, Tahoma Terra successfully defended the approval of its preliminary plat application. A party can be the prevailing party notwithstanding losses on some issues or offsets based on other causes of action. *See Dawson v. Shearer*, 53 Wn.2d 766, 767–68, 337 P.2d 46 (1959) (holding that a party need not prevail on all issues to be prevailing party).

Knight cites to *Pavlina*[9] and *Benchmark*,[10] but *Pavlina* barely discusses its attorney fee award, and in *Benchmark*, the Court of Appeals merely declined to find that the applicant was the prevailing party because the applicant did not improve its position regarding a plat approval in one phase of the dispute.[11] Knight did not improve her position regarding Tahoma Terra's preliminary plat approval. Under RCW 4.84.370, the critical fact is that Tahoma Terra's preliminary plat approval continued

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[9] *Pavlina v. City of Vancouver*, 122 Wn. App. 520, 94 P.3d 366 (2004).

[10] *Benchmark v. City of Battle Ground*, 94 Wn. App. 537, 972 P.2d 944 (1999).

[11] Neither case stands for the proposition that a party must prevail on an identical issue in the different forums in order to be a prevailing party entitled to a fee award.

without material modification. Tahoma Terra substantially prevailed throughout and was entitled to fees.[12]

C. Tahoma Terra should be awarded attorney fees and expenses for answering the petition.

For the same reasons set forth above, and also pursuant to RAP 18.1(j), this Court should award Tahoma Terra its attorney fees and expenses incurred in answering the petition for review, with leave to submit affidavits of fees and expenses within 10 days thereafter.[13]

V. Conclusion

This matter does not warrant review. The Court of Appeals correctly applied the law, ruled that Knight did not establish standing, and awarded Tahoma Terra its attorney fees and costs because it substantially prevailed throughout. The petition for review should be denied.

Dated this 17th day of August, 2010.

SCHWABE, WILLIAMSON & WYATT, P.C.

34211

By: _____

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[12] *See* RCW 4.84.370(1); *see also Baker v. Tri-Mountain Res., Inc.*, 94 Wn. App. 849, 973 P.2d 1078 (1999) (attorneys fees and costs awarded to developer in appeal of land use decision by opponents to development).

[13] RAP 18.1(d).

CERTIFICATE OF SERVICE

On this 17th day of August, 2010, I caused to be delivered in the manner indicated below a true and correct copy of the foregoing ANSWER OF TTPH 3-8, LLC ("TAHOMA TERRA"), TO PETITION FOR REVIEW to the following:

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Mary A. Williams

OFFICE RECEPTIONIST, CLERK

To: Williams, Mary A.
Cc: Folawn, Colin J.
Subject: RE: Filing by Attachment to Email: JZ Knight v. City of Yelm and TTPH 3-8, LLC/No. 84831-9

Rec'd 8/17/2010

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Williams, Mary A. [mailto:MAWilliams@SCHWABE.com]
Sent: Tuesday, August 17, 2010 3:30 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Folawn, Colin J.
Subject: Filing by Attachment to Email: JZ Knight v. City of Yelm and TTPH 3-8, LLC/No. 84831-9

Dear Clerk of the Court: Attached for filing is *Answer of TTPH 3-8, LLC ("Tahoma Terra"), to Petition for Review.*

JZ Knight v. City of Yelm and TTPH 3-8, LLC

Supreme Court No. 84831-9

Colin Folawn, WSBA #34211

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If you have any questions, please contact our office.

Thank you,

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